FILED
MAY 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1479

LINWOOD T. PEOPLES,

Petitioner,

v.

JUDICIAL STANDARDS COMMISSION OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1479

LINWOOD T. PEOPLES,

Petitioner

v.

JUDICIAL STANDARDS COMMISSION OF NORTH CAROLINA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case was filed on December 29, 1978. *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978). A copy of the opinion is set forth in Petitioner's Appendix beginning at page 22.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. **DO STATE CONSTITUTIONAL AND STATUTORY PROVISIONS, AS INTERPRETED BY THE COURT BELOW, DENY THE EQUAL PROTECTION OF THE LAWS, BY PERMITTING JUDGES TO BE DISQUALIFIED FROM HOLDING JUDICIAL OFFICE PURSUANT TO "JUDICIAL STANDARDS" PROVISIONS, WHILE REQUIRING CONVICTION OF CRIME IN THE COURTS OF THE STATE FOR DISQUALIFICATION OF ANY OTHER CANDIDATE FOR JUDICIAL OFFICE?**

II. **ARE THE TERMS "WILFUL MISCONDUCT IN OFFICE" AND "CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE THAT BRINGS THE JUDICIAL OFFICE INTO DISREPUTE" SO INDEFINITE AND UNCERTAIN AS TO BE UNCONSTITUTIONALLY VAGUE?**

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

NONE

Constitution of North Carolina

Article IV, Section 17

Section 17. **Removal of Judges, Magistrates and Clerks.**

(1) Removal of Judges by the General Assembly. Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) **Additional method of removal of Judges.** The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and

for the censure and removal of a Justice or Judge of the Geneal Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) *Removal of Magistrates.* The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) *Removal of Clerks.* Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law.

Article VI, Section 6

Section 6. **Eligibility to Elective Office.** Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for elections by the people to office.

Article VI, Section 8

Section 8. **Disqualifications for office.** The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that would also be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored the rights of citizenship in the manner prescribed by law.

Article I, Section 6

Section 6. **Separation of Powers.** The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Article I, Section 24

Section 24. **Right of Jury Trial in Criminal Cases.** No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, but with the right of appeal for trial de novo.

Article IV, Section 12(1)

Section 12(1). **Supreme Court.** The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below; upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.

North Carolina General Statutes

N.C.G.S. 7A-376

Grounds for Censure or Removal. — Upon recommendation of the Commission, the Supreme Court may censure or remove any Justice or Judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperence, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Upon recommendation of the Commission, the Supreme Court may remove any Justice or Judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become permanent. A Judge removed for mental or physical incapacity is entitled to retirement compensation if he has accumulated the years of creditable service required for incapacity or disability retirement under the provision of State law, but he shall not sit as an emergency Justice or Judge. A Judge removed for other

than mental or physical incapacity receives no retirement compensation and is disqualified from holding further judicial office.

STATEMENT OF THE CASE

Petitioner Linwood T. Peoples served for several years as state District Court Judge of North Carolina's Ninth District. On December 1, 1977 the Judicial Standards Commission notified Linwood T. Peoples that on its own motion it had ordered a preliminary investigation to determine whether formal proceedings should be instituted against him. The notice informed Judge Peoples (1) that the subject of the investigation would be his "alleged misconduct in the handling or disposition of criminal cases in the Ninth Judicial District, including the placing of numerous criminal cases in an inactive file in lieu of disposing of such cases in open court"; (2) that the investigation, reports and proceedings before the Commission would remain confidential and (3) that he had the right to present to the Commission for consideration "such relevant matter" as he might choose. On January 10, 1978, Petitioner submitted his resignation as District Court Judge to be effective February 1, 1978 to the Governor of North Carolina. The resignation was accepted by the Governor effective February 1, 1978.

On January 30, Petitioner was served with a formal complaint by the Judicial Standards Commission alleging "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The alleged facts

upon which the charges were based were specifically set out in the verified complaint attached to the notice. Evidence adduced before the Judicial Standards Commission showed that Petitioner had dismissed some criminal cases without having calendared them for trial, without notice to the district attorney, and without entering judgment in open court; that he had caused criminal cases to be removed from the active pending case files and placed in an inactive or special file where they were retained for varying lengths of time before being dismissed or otherwise disposed of without having been regularly calendared for trial, without notice to the district attorney, and not in open court; and that three defendants had paid amounts equal to court costs to Petitioner, who had agreed to "take care of" their traffic citations for them, with the money being returned to the defendants in two instances and not returned in one instance. The Judicial Standards Commission made findings of fact based on the foregoing evidence, entered conclusions of law that the charges were sustained by the evidence, and recommended that Petitioner be removed from judicial office and be disqualified from holding further judicial office.

On February 1, 1978, Petitioner filed notice of his candidacy for election as Superior Court Judge in the Ninth Judicial District. Following the May 2, 1978, Democratic primary election, Petitioner was certified as the Democratic nominee for that position. He was elected in the state-wide election held on November 28, 1978. Before he could take the oath of office on January 1, 1979, The Supreme Court entered its opinion on December 29, disqualifying him from holding judicial office.

Proceedings before the Judicial Standards Commission result only in a recommended decision. The Supreme Court of North Carolina reviews the findings and conclusions, but acts as the trial tribunal in determining whether sanctions will be imposed, and if so, deciding what those sanctions will be. The Supreme Court adopted the findings and conclusions of the Judicial Standards Commission. It ordered that Petitioner be removed from office as a District Court Judge and be disqualified from holding further judicial office, including the office of Superior Court Judge to which he had been elected by the voters.

Contrary to Petitioner's contention, the issues presented for review in the Petition for Writ of Certiorari filed in this Court were *not* presented in any form, either generally or specifically, for review by the Supreme Court of North Carolina. In the Brief filed in the Supreme Court of North Carolina, a complete copy of which is reproduced as an Appendix commencing on page A-1 of this Response, the Petitioner presented the following assignments of error for review by the Supreme Court of North Carolina. (A. Page 3):

1. Did the Judicial Standards Commission have jurisdiction over the Respondent after resignation as a Judge which resignation had been accepted?

2. Did the Judicial Standards Commision exceed its authority in recommending that the Respondent be barred from holding further judicial office in that the provisions of N.C.G.S. 7A-376 regarding disqualification from holding judicial office are

unconstitutional under the Constitution of North Carolina, Article IV, Section 17(2); Article VI, Section 6 and Article VI, Section 8?

3. Does Article 30 of Chapter 7A of the General Statutes of North Carolina providing for removal or censure of a Judge by the Supreme Court violate the Constitution of North Carolina, Article IV, Section 12(1), and Article I, Section 6?

4. Does Article 30 of Chapter 7A of the General Statutes of North Carolina providing for the removal or censure of a Judge violate the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States?

However, from a review of the Brief filed by Petitioner in the Supreme Court of North Carolina, it is evident that he only briefed and argued the first three assignments of error, those exclusively dealing with the Constitution and Statutes of the State of North Carolina. Petitioner *did not* brief and argue the fourth assignment of error, the one presenting the federal question and, therefore, pursuant to Rules 28(a) and 28(b)(3) of the North Carolina Rules of Appellate Procedure, it was deemed abandoned.[1] See *State* v. *Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976); *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5 (1976); *State* v. *Brothers*, 33 N.C. App. 233, 234 S.E. 2d 652 (1977).

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[1]Rule 28(a) of the North Carolina Rules of Appellate Procedure reads as follows:

FUNCTION:

The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their responsive positions thereon. Review is limited to questions so presented in the several briefs. *Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in the party's brief, are deemed abandoned.* Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned. [See 287 N.C. 671, 741 (1975)] (Emphasis added.)

Rule 28 (b) (3) further provides that:

An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by the numbers and by the pages of the printed record on appeal at which they appear. *Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.* [See 287 N.C. 671, 742 (1975)] (Emphasis added.)

In the Supreme Court of North Carolina the Petitioner did not rely upon any federal grounds to contest his disqualification from holding judicial office. He relied solely and exclusively upon the Constitution and Statutes of North Carolina and any argument to the contrary is belied by his Brief, a copy of which is reproduced in its entirety as an Appendix to this Response. (A. pp. 1-15, infra.)

REASONS WHY THE WRIT SHOULD BE DENIED

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND THE QUESTIONS SOUGHT TO BE REVIEWED WERE NEITHER TIMELY NOR PROPERLY RAISED, NOR EXPRESSLY PASSED ON. THE OPINION OF THE SUPREME COURT OF NORTH CAROLINA RESTS SOLELY AND EXCLUSIVELY ON AN ADEQUATE NONFEDERAL BASIS.

The federal questions presented in the Petition (p. 2) are:

1. Do state constitutional and statutory provisions, as interpreted by the Court below, deny the equal protection of the laws, by permitting judges to be disqualified from holding judicial office pursuant to "judicial standards" provisions, while requiring conviction of crime in the courts of the state for the disqualification of any other candidate for judicial office?

2. Are the terms "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" so indefinite and uncertain as to be unconstitutionally vague?

But the Supreme Court of North Carolina did not decide these questions since they were not presented,

either specifically or generally, in the Court below. The Petitioner presented four assignments of error in the Supreme Court of North Carolina. These assignments of error were:

1. Did the Judicial Standards Commission have jurisdiction over the respondent after resignation as a Judge which resignation had been accepted?

2. Did the Judicial Standards Commission exceed its authority in recommending that the Respondent be barred from holding further judicial office in that the provisions of N.C.G.S. 7A-376 regarding disqualification from holding judicial office are unconstitutional under Constitution of North Carolina, Article IV, Section 17(2); Article VI, Section 6, and Article VI, Section 8?

3. Does Article 30 of Chapter 7A of the General Statutes of North Carolina providing for removal or censure of a Judge by the Supreme Court violate the Constitution of North Carolina, Article IV, Section 12(1) and Article I, Section 6?

4. Does Article 30, Chapter 7A of the General Statutes of North Carolina providing for the removal or censure of a Judge violate the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States?

However, the Petitioner did not present and argue in his Brief below the fourth assignment of error and questions raised by assignments of error but not presented in a party's brief are deemed abandoned by

North Carolina practice. The applicable rule, Rule 28 of the North Carolina Rules of Appellate Procedure, provide, in pertinent part, that:

> (a) . . . Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in party's brief, are deemed abandoned. . . .
>
> (b)(3) . . . Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.[2]

Furthermore, during oral argument of this case before the Supreme Court of North Carolina the following colloquy occurred:

> Mr. Rogers [Petitioner's counsel] — May it please the Court, I'm Bobby Rogers of Henderson, North Carolina, and I represent the Respondent along with Mr. Banzet. First off, I'm going to deviate a little bit from the way I posed questions in the brief and discuss them in this order. Regarding question 3 and that was the question on the constitutionality of the

[2]See fn. 1 supra, at pp. 10-11, for the complete text Rules 28(a) and 28(b) (3) of the North Carolina Rules of Appellate Procedure. The North Carolina Rules of Appellate Procedure may be found in their entirety in 287 N.C. at 679 (1975).

These rules have been applied in *State* v. *Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976); *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5 (1976); and *State* v. *Brothers*, 33 N.C.App. 233, 234 S.E.2d 652 (1977).

> General Assembly having the power to grant the Supreme Court jurisdiction to hear this matter, I believe that question is answered fully *In re Martin*, so I'm not going to discuss that with you, but I go back to question 1 in my brief at this time and that question is, as I understand it, Did the Judicial Standards Commission have jurisdiction over the respondent after his resignation as a judge which resignation had been accepted?
>
> Judge Copeland — In other words I take it you're waiving any argument that you have pertaining to No. 3 because of the opinion in *In re Martin*, is that ocrrect?
>
> Mr. Rogers — Yes, sir, I think the opinion in *In re Martin* discussed that question and amply disposed of it.
>
> *Judge Copeland — And also it is my information and the Court's information, that you are not raising any U.S. Constitutional provisions.*
>
> *Mr. Rogers — I'm not discussing that — I abandon that in this. . .*
>
> *Judge Copeland — You have abandoned any U.S. constitutional provision.*
>
> *Mr. Rogers — Yes, sir.*
>
> *Judge Copeland — Thank you.*[3] (Emphasis added.)

[3]Transcript of oral argument.

It is essential to the jurisdiction of this Court under §1257 that a substantial federal question has been properly raised in the State court proceedings. For the purpose of certiorari under subsection (3), the validity of the State statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "specially set up or claimed." As stated in Mr. Justice Harland's dissent in *Amalgamated Food Employees' Union* v. *Logan Valley Plaza*, 391 U.S. 308 at 334 (1968), in determining whether a question was "specifically set up or claimed" within the meaning of § 1257(3), "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues." And the proper method of raising the federal question is dependent upon the particular state practice, at least as long as the litigant thereby has a reasonable opportunity to have such an issue heard and determined. *Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Parker* v. *Illinois*, 333 U.S. 571 (1948); *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U.S. 447 (1936); *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190 (1925).

Once a substantial federal question has been properly framed, it becomes important that it be raised at the proper point in the state court proceeding. *Beck* v. *Washington*, 369 U.S. 541 (1962); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919) In Mr. Justice Harland's words: "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, supra. It has long been established that this Court is vested with no jurisdiction unless a

federal quesion was raised and decided in the state court below. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 285 (1836).

The jurisdictional factor is especially significant where the highest state court fails or refuses to pass expressly upon the federal question. In that situation, the party invoking this Court's jurisdiction has the burden of showing that he properly raised the question so that the state court's failure to deal with it was not for want of proper presentation. This Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggravated party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576 (1969). And Rule 23(1)(f) states that the petitioner seeking review of a state court decision in this Court, in meeting this burden, must "specify the stage in the proceedings in the Court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised...."

The litigant must follow the state procedures in raising the federal question. Any failure to do so is fatal. The federal question must be pursued to the highest state courts and must be pursued in the manner and with the degree of specificity required by the state Rules of Practice. See *Beck* v. *Washington*, supra. "Without doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this

regard are no less applicable where federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John* v. *Paullin*, 231 U.S. 583 (1913).

Thus, a waiver will be implied if the litigant fails to obey a state rule of procedure providing the federal constitutional issues raised in the trial court must be reviewed, if at all, directly by the State Supreme Court. *Parker* v. *Illinois*, supra. A similar waiver is assumed if the litigant fails to urge a federal issue on a second appeal after having raised the point on the first appeal in the state courts. A waiver has also been found where the litigant fails to list the federal issue among the "assignments of error" in his brief filed in the State Supreme Court or to argue the point in that brief, the matter merely having been mentioned in one sentence of is brief in that court. *Beck* v. *Washington*, supra. And where a party fails to raise an issue in the "statement of the questions presented" in its brief to the state supreme court, as required by court rule in order for the issue to be considered, and where the issue was not otherwise argued in the brief or even mentioned in the state court opinion, this Court will decline to consider that issue. *Amalgamated Food Employees' Union* v. *Logan Valley Plaza*, supra.

It is too late to raise twice abandoned federal questions for the first time in the Petition for Writ of Certiorari filed in this Court. The Petition is not a part of the record of the state court proceedings and it is the record below which must affirmatively show a raising of the federal issue.

White River Lumber Co. v. *Arkansas ex rel Appelgate*, 279 U.S. 692 (1929). In this case the record affirmatively shows the intentional abandonment below of the federal issues.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied for lack of jurisdiction, with all costs being assessed against Petitioner.

Respectfully submitted,

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APPENDIX

NO. 97 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1978

****

IN RE:	)
	)
INQUIRY CONCERNING A JUDGE	)From the
NO. 53	)Judicial
LINWOOD T. PEOPLES,	)Standards
RESPONDENT	)Commission

****

RESPONDENT APPELLANT'S BRIEF

****

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QUESTIONS

1. Did the Judicial Standards Commission have jurisdiction over the respondent after resignation as a judge which resignation had been accepted?

2. Did the Judicial Standards Commission exceed its authority in recommending that the respondent be barred from holding further judicial office in that the provisions of NCGS 7A-376 regarding disqualification from holding judicial office are unconstitutional under the Constitution of North Carolina, Article IV, Section 17 (2); Article VI, Section 6 and Article VI, Section 8?

3. Does Article 30 of Chapter 7A of the General Statutes of North Carolina providing for removal or censure of a Judge by the Supreme Court violate the Constitution of North Carolina, Article IV, Section 12(1) and Article I, Section 6? (Page 1)

4. Does Article 30, Chapter 7A of the General Statutes of North Carolina providing for the removal (Page 2) or censure of a Judge violate the provisions of the 5th and 14th Amendment of the Constitution of the United States?

STATEMENT OF CASE

Linwood T. Peoples, the respondent submitted his resignation as a District Court Judge to the Governor effective February 1, 1978, and the same was accepted on January 20, 1978. The Judicial Standards Commission instituted formal proceedings against the respondent by notice and complaint dated January 30,

1978 and the same was served on the respondent on January 30, 1978.

The respondent thereafter filed a Special Appearance, which was treated by the Commission as a motion to dismiss, contesting the jurisdiction of the Commission over him and the subject matter.

Briefs were submitted by respondent's attorneys and Special Counsel and the Commission denied the relief.

The Commission then conducted a formal hearing at which the respondent did not appear, however, his attorneys did appear. The Commission heard evidence and recommended that the respondent be removed from office, receive no retirement compensation and be disqualified from holding further judicial office.

ARGUMENT

1. DID THE JUDICIAL STANDARDS COMMISSION HAVE JURISDICTION OVER THE RESPONDENT AFTER RESIGNATION AS A JUDGE WHICH RESIGNATION HAD BEEN ACCEPTED?

NCGS 7A-376, *Grounds for Censure or Removal,* provides, "Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration

of justice that brings the judicial office into disrepute. Upon recommendation of the Commission, the Supreme Court may remove any justice or judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become, permanent. A judge removed for mental or physical incapacity is entitled to retirement compensation if he has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office."

The General Assembly enacted this provision under authority from Article IV, Sec. 17(2) of the Constitution of North Carolina, which states, "ADDITIONAL METHOD OF REMOVAL OF JUDGES. The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Page 3)

It appears that NCGS 7A-376 gives the Judicial Standards Commission authority to make

recommendations concerning the censure and removal of a Judge for certain acts. In this particular case, respondent has resigned and this fact would make the question of his removal by the Court on recommendation by the Commission moot.

In *Rice* v. *Rigsby,* 259 NC 506, 131 SE 2d 469 (1963), the Court said "Appellate Courts will not decide moot or academic questions." See also 46 A, Jur 2d, Judges § 17 as to the effectiveness of a resignation by a Judge. It appears that resignation terminates any form of removal. However, some Courts have held where a statute provides for a disqualification or ineligibility to hold public office in the future, it would permit the removal from office of an official who has been elected to a second term for acts of misconduct committed in a prior term. 42 ALR 3d 691 (§§ 8 and 9) pp 703-719. This seems to be used only when someone is still in office in a succeeding term. It could possibly apply in the present situation except that it appears that the General Assembly in enacting NCGS 7A-376, providing for disqualification from further judicial office for anyone removed from office, over extended the constitutional authority of Article IV, § 17(2), therefore, this portion of the statute would be unconstitutional unless the authority for it could be found elsewhere. This point will be discussed more under Question 2.

The Supreme Court has held that the purpose of the procedure before the Judicial Standards Commission is not to punish an errant judge, but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor

and integrity of its judges. *In re Crutchfield,* 289 NC (Page 4) 597, 223 SE 2d 822 (1975); *In re Edens,* 290 NC 299, 226 SE 2d 5 (1976).

To have a proceeding continued against a judge who no longer holds office simply to try to disqualify him from judicial office and cause him to lose his retirement can only be interpreted as punishment. Since the Court has stated this is not the purpose of the proceeding, to proceed, when these are the only sanctions, is to proceed to decide a moot question. Therefore, the Judicial Standards Commission and the Supreme Court should decide that it has no jurisdiction in this matter.

2. **DID THE JUDICIAL STANDARDS COMMISSION EXCEED ITS AUTHORITY IN RECOMMENDING THAT THE RESPONDENT BE BARRED FROM HOLDING FURTHER JUDICIAL OFFICE IN THAT THE PROVISION OF NCGS 7A-376 REGARDING DISQUALIFICATION FROM HOLDING JUDICIAL OFFICE ARE UNCONSTITUTIONAL UNDER THE CONSTITUTION OF NORTH CAROLINA SECTION 17(2); ARTICLE VI, SECTION 6 AND ARTICLE VI, SECTION 8?**

The Constitution of North Carolina in Article VI, Sec. 6 *Eligibility to Elective Office,* reads: "Every qualified voter in North Carolina, who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.", and Article VI, Sec. 8 *Disqualifications for Office,* reads: "The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged (Page 5) guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law." The disqualifications for office are explicit, being only those enumerated in this Article. These reasons are not the same as those enumerated in NCGS 7A-376 and in Article IV, Sec. 17(2) of the Constitution. Corruption or malpractice in office cannot be equated to wilful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office in disrepute. In the matter of Judge Joseph P. Edens, 290 NC 299, 226 SE 2d 5 (1976), the Supreme Court defined these terms as follows: "Wilful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present...

Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as conduct which a judge undertakes in good faith but which nevertheless, would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."

This respondent contends that the language used in Article VI regarding removal are not the same and the disqualification clause (Page 6) in NCGS 7A-376 is unconstitutional unless authority for disqualification can be found elsewhere in the North Carolina Constitution. Article IV, Sec. 17(2) is silent regarding disqualification except Article IV, Sec. 17(1) provides for removal by impeachment and this conduct is expressly prohibited in Article VI, Sec. 8. However, Sec. 17(2) of Article IV is only a method for removal in addition to impeachment and address. The only prohibitions from holding a public office or a judicial office are those expressly set forth in Article VI, Sec. 8.

However, if the acts enumerated in Article VI, Sec. 8 of the N.C. Constitution should be held to be the same as those prohibited under Article IV, Sec. 17(2), then you still have to detrmine whether or not the procedure before the Judicial Standards Commission and the Supreme Court has the same effect as being *Adjudged* Guilty as used in Article VI, Sec. 8 of the Constitution. This respondent contends it does not.

Article VI, Sec. 8, states, "... any person who has been adjudged guilty of treason or any other

felony...or...who has been adjudged guilty of corruption or malpractice in any office..."

Adjudged guilty means, in both instances, convicted and only that. Article I, Sec. 24 of the N.C. Constitution provides that no person shall be convicted of any crime but by unanimous verdict of a jury in open Court. To be adjudged guilty of any felony could only mean to be convicted of a crime on a unanimous verdict of the jury. In 71 ALR 2d 593, this point is discussed at length and all cases agree that to have a conviction there must be a plea of guilty or a verdict of guilty and adjudged guilty is the judgment entered on either the plea or verdict. See also *Keogh* v. *Wagner,* 20 AD 2d 380, 247 NYS (Page 7) 2d 269 (1964), wherein the Supreme Court, Appellate Division of the State of New York said, "To constitute a conviction within Public Offices Law providing that office shall be vacant upon conviction of incumbent of felony or crime involving violation of oath of office, there must not only be adjudication of guilt, by plea or verdict, but in addition a judgment, whether judgment imposes sentence or suspends sentence." See also, *Vasquez* v. *Courtney,* Or., 537 P 2d 536 (1975), where held, "conviction or convicted means an adjudication of guilt upon a verdict or finding entered in a criminal proceeding in a court of competent jurisdiction."

In order for a removal by the Supreme Court upon the recommendation of the Judicial Standards Commission to result in a disqualification to hold judicial office, the respondent wold have to be ADJUDGED GUILTY of the prohibited acts. This Court stated in *In re Crutchfield,*

289 NC 597, 223 SE 2d 822, "Proceeding to review recommendations of Judicial Standards Commission for censure of judge is neither criminal nor civil in nature, but is inquiry into conduct of judicial offices,..." This position has been maintained by the Court in other cases dealing with procedures before the Judicial Standards Commission. In re Edens 290 N.C. 299, 226 SE 2d 5 (1976), *In re Nowell,* 293 N.C. 235, 277 SE 2d 246 (1977), *In re Hardy,* ____ N.C. ____, 240 SE 2d 367 (1978).

If the proceeding before the Court is neither criminal nor civil in nature, there can be no adjudication of guilt within the meaning of Article VI, Sec. 8 of the Constitution of North Carolina and no resulting disqualification. Thus, this respondent respectfully contends that the portion of the NCGS 7A-376 dealing with the disqualification is unconstitutional. (Page 8)

3. DOES ARTICLE 30 OF CHAPTER 7A OF THE GENERAL STATUTES OF NORTH CAROLINA PROVIDING FOR REMOVAL OR CENSURE OF A JUDGE BY THE SUPREME COURT VIOLATE THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV, SECTION 12(1) AND ARTICLE I, SECTION 6?

This respondent further contends that Article 30 of Chapter 7A of the General Statutes of North Carolina providing for the removal or censure of a Judge by the Supreme Court is violative of the Constitution of North Carolina, Article IV, Sec. 12(1) which provides for

Supreme Court jurisdiction as follows: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.", and Article I, Sec. 6, which provides, "*Separation of Powers.* The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.", and has been held to prevent the General Assembly from conferring jurisdiction outside that specified in Article IV, Sec. 12(a).

In *Smith* v. *State*, 289 NC 303, 222 SE 2d 412 (1976), the Court stated, "It is a well established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution. This principle is grounded on the separation of powers provisions found in many American constitutions, including N.C. Constitution, Article I, Sec. 6 and Art. IV, Sec 1." (Page 9)

Article .IV, Sec. 17(2) nowhere authorizes the General Assembly to confer jurisdiction on the Supreme Court for the censure or removal of Judges, it does, however, authorize the General Assembly to prescribe a procedure to accomplish these goals. This Article would have to expressly provide the General

Assembly with the authority to confer jurisdiction on the Supreme Court in order for it to be validly done in the face of Article IV, Sec. 12(1) and Article I, Sec. 6 of the N.C. Constitution. This Court held in *In re Hardy, supra;* and in *In re Nowell, supra,* that it had jurisdiction under Article 30 of Chapter 7A of the General Statutes of North Carolina to disregard the findings and recommendations of the Judicial Standards Commission and make its own findings, draw its own conclusions and enter appropriate orders which amounts to original jurisdiction in these matters and exceeds that conferred by Article IV, Sec. 12(1) of the Constitution. This respondent therefore contends that Article 30 of Chapter 7A of the General Statutes of North Carolina granting jurisdiction in these matters to the Supreme Court is unconstitutional.

CONCLUSION

This respondent contends that the Judicial Standards Commission had no jurisdiction to proceed against him after his resignation and if the Commission did have jurisdiction, the recommendation of the Commission and subsequent Order of Removal by the Supreme Court (if this happens) will not have the effect of disqualifying respondent from further judicial office as this is an unconstitutional provision of Article 30 of Chapter 7A of the General (Page 10) Statutes of North Carolina.

This respondent further contends that Article 30 of Chapter 7A of the General Statutes violates the North Carolina Constitution in that the General Assembly is without power to vest jurisdiction for removal in the Supreme Court.

Respectfully submitted this 23rd day of May, 1978.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the attached Brief in the above entitled matter in the following manner:

By depositing the same, enclosed in post-paid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department, addressed:

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Judicial Standards Commission
P.O. Box 1122
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Mr. Harold D. Coley, Jr.
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Judicial Standards Commission
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Service being in accordance with Rule 5, Chapter 1A-1 of the General Statutes of North Carolina.

This the 23 day of May, 1978

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